STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

KEITH A. HUBBARD,

Plaintiff-Appellant,

v

NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK,

Defendant-Appellee,

and

SAUK TRAIL DEVELOPMENT, INC., a/k/a SAUK TRAIL HILLS DEVELOPMENT, ALLIED WASTE SYSTEMS, INC., a/k/a ALLIED WASTE INDUSTRIES, INC., and AUTO CLUB INSURANCE ASSOCIATION, d/b/a AUTO CLUB INSURANCE COMPANY and AUTOMOBILE CLUB OF MICHIGAN INSURANCE GROUP,

Defendants.

UNPUBLISHED
September 7, 2004

No. 246165
Wayne Circuit Court
LC No. 01-115388-NO

ORAL ARGUMENT REQUESTED

NOTICE OF HEARING

PROOF OF SERVICE

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NATIONAL RAILROAD PASSENGER CORPORATION, a/d/a Amtrak, a District of Columbia corporation,

Defendant-Appellant

Supreme Court Case No.

Court of Appeals Case No. 246165

Lower Court Case No. 01-115388-NO
Hon. Gershwin Drain

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APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JUDGMENT OR ORDER APPEALED FROM AND RELIEF SOUGHT

I. Judgment Or Order Appealed From

Defendant, by and through its attorneys Holman Davis & Associates, PLLC, seeks Leave to Appeal to this Court pursuant to MCR 7.302 from a non-unanimous Opinion of the Court of Appeals dated September 7, 2004 (Exhibit 1, 9/7/04 Court of Appeals Decision) reversing the Judgment of the Trial Court Granting Summary Disposition (Exhibit 2, 12/18/02 Judgment of the Trial Court) on plaintiff's negligent design case brought under the Federal Employer's Liability Act and remanding the case to the Trial Court on that issue.

In support of this Application, defendant will show that:

1. The ruling of the Court of Appeals is in conflict with this Court's Opinion in *Smith v Globe Life Insurance Company*, 460 Mich 446 (1999) and MCR 2.116(G)(6). (MCR 7.302(B)(5).)

2. The Rulings of the Court of Appeals on the issues raised in this Application are clearly erroneous and will cause material injustice. (MCR 7.302(B)(5).)

The Court of Appeals' decision of September 7, 2004 is clearly erroneous and will cause material injustice. The effect of the Court's ruling is to permit a defendant to be liable in a negligent design case involving a locomotive cab, even though the defendant fully complied with all federal regulations specifically dealing with the locomotive cab and locomotive seat and there was no expert testimony to establish that the design was negligent, based on inadmissible evidence and complaints that the design was unsafe. The Court's erroneous ruling is based on its:

a. failure to require a plaintiff to present admissible evidence to defeat a motion for summary disposition including failure to properly apply MRE with respect to the opinion testimony of lay witnesses (MRE 701) and admissions by party-opponent (MRE 801(d)(2)), which the Court of Appeals incorrectly describes as a "statement" by a party-opponent.

b. failure to require expert testimony on technical design issues that are beyond the common experience and understanding of the average juror.

c. failure to require anything more than complaints by plaintiff and other employees that the locomotive seat should have been designed to swivel freely at all times without any latch to secure it in place because of the design of the locomotive cab to establish liability even though defendant was required by the LIA to provide a seat that is securely mounted and braced. 49 CFR § 229.119(a)

d. failure to hold that defendant's compliance with federal regulations enacted pursuant to the Locomotive Inspection Act ("LIA") precluded a negligent design claim under the Federal Employer's Liability Act ("FELA") where the regulations covered the same subject matter and the design plaintiff claimed should have been provided was inconsistent with the federal regulations.

II. Relief Sought

Defendant-Appellant requests that this Court grant Leave to Appeal in this case and reverse the portion of the decision of the Court of Appeals that reversed the Trial Court's Judgment Granting Summary Disposition on plaintiff's negligent design case under the FELA and reinstate the judgment of the Trial Court granting summary disposition on that issue.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS' FAILURE TO AFFIRM THE TRIAL COURT'S DECISION GRANTING SUMMARY DISPOSITION ON PLAINTIFF'S NEGLIGENCE CLAIM UNDER THE FELA THAT DUE TO THE CONCERNS OF THE CRASHWORTHINESS OF THE LOCOMOTIVE CAB AND THE CRAMPED DESIGN OF THE LOCOMOTIVE CAB, DEFENDANT SHOULD HAVE PROVIDED A LOCOMOTIVE SEAT THAT WAS DESIGNED TO SWIVEL WITHOUT ANY LATCH TO SECURE IT IN PLACE SO THAT PLAINTIFF COULD EXIT THE SEAT WITHOUT TAKING A SECOND TO UNLATCH IT AFTER A COLLISION HAD ALREADY OCCURRED REQUIRES REVERSAL WHERE THERE WAS NO EXPERT TESTIMONY OR OTHER ADMISSIBLE EVIDENCE PRESENTED TO THE TRIAL COURT AS REQUIRED BY THIS COURT'S DECISION IN *SMITH v GLOBE LIFE INS CO,* 460 MICH 446 (1999) THAT THE LOCOMOTIVE WAS NOT CRASHWORTHY, THE DESIGN OF THE LOCOMOTIVE CAB WAS UNSAFE, THE DESIGN OF THE SEAT WAS UNSAFE, NO TESTIMONY THAT ANY EQUIPMENT WAS DEFECTIVE AND NO CLAIM THAT DEFENDANT FAILED TO COMPLY WITH EXTENSIVE FEDERAL REGULATIONS ON THE DESIGN OF THE LOCOMOTIVE AND THE SEAT.

II. WHETHER THE COURT OF APPEALS' FAILURE TO AFFIRM THE TRIAL COURT'S SUMMARY JUDGMENT ON PLAINTIFF'S FELA NEGLIGENT DESIGN CLAIM WITH RESPECT TO THE LOCOMOTIVE SEAT REQUIRES REVERSAL WHERE PLAINTIFF DID NOT CLAIM OR PRESENT ANY EVIDENCE THAT DEFENDANT VIOLATED THE LIA OR FEDERAL REGULATIONS THAT WERE RELEVANT TO PLAINTIFF'S CLAIM AND WHERE PLAINTIFF'S NEGLIGENT DESIGN CLAIM WOULD REQUIRE THAT DEFENDANT PROVIDE A LOCOMOTIVE SEAT THAT SWIVELED AT ALL TIMES EVEN THOUGH THE FEDERAL REGULATION FOR LOCOMOTIVE SEATS, 49 USC § 229.119(a), REQUIRES THAT SEATS BE SECURED AND BRACED, BECAUSE THE FELA CLAIM BASED ON THE FACTS WAS PRECLUDED OR PREEMPTED BY THE LIA.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

I. MATERIAL PROCEEDINGS

Plaintiff was a 59-year old locomotive engineer at the time of the accident who had worked as an engineer since 1968. (Exhibit 3, plaintiff's deposition, p. 22.) Plaintiff's Second Amended Complaint alleged liability under both the Federal Employers' Liability Act (FELA), 45 USC § 51, *et seq.*, and the Locomotive Inspection Act (LIA), 49 USC § 20701, *et seq.* All of plaintiff's injuries and damages in this case arise out of a minor crossing accident that occurred on May 18, 1998 at Lilly Road in Canton Township, Michigan. If this were an automobile accident, it would be considered a "fender bender." The side-view mirror was knocked off the side of the locomotive[1] when it nicked the rear of a truck stopped on the north side of the crossing. The Lilly Road crossing has the utmost protection — flashers and gates. The principal cause of this minor accident was the negligence of the unknown driver of the truck, who stopped the truck with the rear of the truck near the crossing, then backed up as the train approached, and plaintiff was allegedly injured when he fell while diving out of his seat after the impact, when broken glass from the side mirror came through the window.

Plaintiff suffered very minor injuries (a bruised left hip) and was released to return to work within two months of the accident. However, he then began treating for post-traumatic stress disorder and did not return to work until the fall of 1999. In January 2000, plaintiff was diagnosed with a herniated disc. Plaintiff took his normal retirement at age 62 with full benefits. The FELA is a pure comparative negligence statute similar to the pure comparative negligence

[1] Plaintiff was operating what is commonly referred to in testimony as a cab car. There are several different types of cab cars. All cab cars are by definition a locomotive. 49 CFR § 229.5(k)(1).

system that formerly existed in Michigan. In order to prevail under the FELA, plaintiff must prove the essential elements of a negligent cause of action: duty, negligence, causation and damages. *Green v River Terminal Ry Co*, 763 F2d 805 (5th Cir 1985). "Whether an employee is negligent is determined under the common law 'ordinary prudence' standards applicable to federal negligence actions." (Exhibit 1, p. 4.)

Plaintiff's original complaint set forth a laundry list of allegations of negligence that were non-specific as to any problems with the equipment plaintiff was using. In fact, he did not mention the design of the locomotive seat, which is the issue in this appeal, in his original Complaint. Plaintiff's Second Amended Complaint contained the same general allegations of negligence as did his original Complaint – that defendant failed to provide safe and proper equipment. Plaintiff's Second Amended Complaint added a second count for violation of the LIA. Plaintiff simply alleged that the locomotive did not comply with the requirements of the LIA. Again, the locomotive seat was never mentioned.

Due to the fact that plaintiff's allegations in his Complaint were very broad, vague and nonspecific, defendant categorized plaintiff's FELA claims in its brief to the Trial Court in support of its Motion For Summary Disposition as follows:

1. Defendant failed to provide plaintiff with safe and proper equipment.
   - A. Cab car was not crashworthy;
   - B. Seat locked in place in a confined area that prevented plaintiff from safely exiting in an emergency.
2. Failed to provide proper training, instruction, safety rules and procedures.
   - A. Failed to train on what to do in an emergency situation;
   - B. Failed to provide proper training on use of equipment;

3. Crossing was unsafe because of ongoing problem with dump trucks ignoring signals and fouling grade crossing as they attempted to access the land fill.

4. Failure to warn of all hazards listed in 1 through 4.

Plaintiff raised no other issues of negligence in his Memorandum in Opposition to Defendant's Motion ("Memorandum"). Plaintiff also made the following two claims under the LIA at page 12 of his Memorandum to the Trial Court.

1. The cab car was not crashworthy;

2. The engineer's seat was in cramped quarters and locked in place.

All of plaintiff's claims under the FELA and LIA listed above were argued in the briefs submitted to the Trial Court by the parties. At the hearing on the Motion for Summary Disposition, plaintiff in hopes of salvaging his meritless case, essentially conceded all claims except those relating to the design of the locomotive seat and that the crossing was unsafe. (Exhibit 4, Transcript of Summary Disposition Hearing, p. 4.) The Trial Court gave plaintiff every opportunity to recite evidence on which he relied to support these two claims at the hearing.

Attached to plaintiff's Memorandum were numerous exhibits. As will be discussed in part I. A. of the Argument, plaintiff relied on case law at page 13 of his Memorandum that had been overruled and that had not required a showing of admissible evidence to defeat a summary disposition motion. Proceeding on that erroneous assumption, plaintiff attached numerous exhibits to his Memorandum without establishing their admissibility, including the following:

1. The affidavit of plaintiff's attorney Ronald Barczak. This was not marked as an exhibit but was attached to plaintiff's Memorandum and was used to identify several exhibits that were hearsay and/or never identified by any witness through deposition or affidavit.

2. Exhibit D to Plaintiff's Memorandum – photographs of cab car. These photographs were never identified by any witnesses in the case, under oath, as photographs of cab car compartment and seat identical or substantially identical to the one involved in the accident. The only authentication for these photographs that was given in plaintiff's Memorandum was the affidavit of Ronald Barczak.

3. Exhibit E to plaintiff's Memorandum – the hearsay statement of Daniel Aldridge, an Amtrak engineer. The statement was not under oath and was only identified by attorney Barczak.

4. Exhibit F to plaintiff's Memorandum – the hearsay statement of William Kushta. This was an *ex parte* statement taken by plaintiff's attorney's investigator. It was not under oath. It was established in deposition testimony that Mr. Kushta was deceased. The statement does not fit into any exception under the hearsay rule.

5. Exhibit J to plaintiff's Memorandum – the hearsay letter of Ron Black, dated May 14, 1994. This letter was never identified at Black's deposition and was not under oath. At page 7 of plaintiff's Memorandum, plaintiff argued this exhibit established that Amtrak started replacing the seats that locked in place over eight years before the accident. However, it was inadmissible hearsay that could not be considered by the Trial Court. At page 15 of plaintiff's brief to the Court of Appeals, plaintiff listed four items of "evidence" of negligence. Item (4) claims there was evidence that Amtrak began replacing these seats eight years earlier. Nowhere in plaintiff's brief on appeal did he cite what that evidence was. For good reason – it was not admissible evidence. The only proof plaintiff offered to the Trial Court for this statement was Exhibit J to plaintiff's Memorandum. The Court of Appeals, in its decision, stated that engineer Black testified that after a 1990 memorandum regarding complaints about the seats, Amtrak

began replacing locking seats with non-locking ones. (Exhibit 1, p. 5.) Black never gave any such testimony at his deposition. His actual testimony was that the seats on some cab cars may have replaced with seats using a different locking device. (Exhibit 5, Black Deposition, p. 46.) He also stated that he was not even sure the newer seats were ever put on cab cars: "that's one fact I'm a little gray on." (Exhibit 5, p. 54.)

6. Exhibit K to plaintiff's memorandum – the typed Interoffice Memorandum of September 11, 1990 – allegedly from Paul LaClair reporting that several engineers had complained about seats in cab cars. This exhibit was never identified or authenticated in any affidavit or deposition by any witness. Plaintiff sought to authenticate it with the affidavit of plaintiff's attorney Barczak. There was no testimony offered by any witness to lay any foundation for the admission of this exhibit as either an admission or a business record. It was clearly hearsay.

The Trial Court granted defendant's Motion for Summary Disposition on all of plaintiff's FELA claims, noting that plaintiff failed to provide any expert testimony on the seat design. Plaintiff conceded in the Court of Appeals that the Trial Court properly granted defendant's motion on all of plaintiff's FELA claims except for the claim that the seat in the cab car was unsafe and should have been allowed to swivel freely and not require the release of a latch to make it swivel because of the necessity to exit the cab car quickly, in this case instantly, in the event of a collision. Plaintiff claimed the seat needed to swivel because of the cramped quarters in the cab car and that he needed to exit the cab of the cab car because of the concern of the crashworthiness of the cab.

The LIA is an amendment to the FELA statute. Unlike the FELA general standard of care, the LIA requires railroads to provide locomotives that are equipped as required by the Act

and regulations enacted by the Federal Railroad Administration (FRA). Both the FRA and United States Supreme Court have stated that the LIA was intended to and does regulate the entire field of locomotive equipment. To recover under the LIA, plaintiff must prove that the locomotive did not comply with the LIA or its regulations or was negligently maintained. Plaintiff at the trial court level claimed that Amtrak violated the LIA because the cab car was not "in proper condition and safe to operate without unnecessary danger of personal injury" as required by 49 USC § 20701(1), because the cab car was not crashworthy and the engineer's seat locked in place and did not swivel. The same basis for his FELA claim.

The FRA has enacted extensive regulations setting forth equipment requirements for locomotives and their maintenance. 49 CFR § 229, *et seq.*. These regulations contain a regulation on the body structure of a locomotive, 49 CFR § 229.141, and the locomotive seat, 49 CFR § 229.119(a). Plaintiff did not allege that defendant violated either of these regulations or any other regulation and there was no evidence to that effect. Plaintiff offered no expert testimony to support any of his claims under the LIA.

The Trial Court granted defendant's Motion for Summary Disposition on Plaintiff's claims brought under the LIA. Plaintiff did not contest the Trial Court's ruling granting defendant's motion on plaintiff's LIA claim that the cab car was not crashworthy in the Court of Appeals, even though most of the discovery related to that issue. Plaintiff's only claim in the Court of Appeals was that the Trial Court should not have dismissed plaintiff's FELA and LIA claims that the design of seat was unsafe considering the design of the cab of the locomotive for crashworthiness and the cramped quarters of the cab of the locomotive.

Plaintiff also argued in his brief to the Court of Appeals, as he did to the Trial Court, that a plaintiff's burden of proof in a negligence claim brought under the FELA is less demanding

than in an ordinary negligence case. Therefore, plaintiff argued to the Court of Appeals, the "trial judge . . . it is clear that he mistakenly applied a general negligence (or possibly a negligent design) standard in evaluating whether plaintiff had established a prima facie case of negligence under the FELA." (Plaintiff-Appellant's Brief on Appeal, pp. 10-11.)

The Court of Appeals agreed with the Trial Court on plaintiff's LIA claim and affirmed the judgment below on that issue. In part, as stated in its Opinion, "Because plaintiff's complaint does not allege that the seat or locking mechanism was not working properly or that some other factor prohibited it from working properly, plaintiff presented no evidence the seat was defective or unsafe in and of itself." (Exhibit 1, p. 7.) In addition, the Court of Appeals noted there was no evidence that the seat violated the FRA regulation pertaining to locomotive seats. This regulation provides that "**CAB SEATS SHALL BE SECURELY MOUNTED AND BRACED.**" 49 CFR § 229.119(a).

Given the language of this regulation, defendant argued to the Court of Appeals that had defendant provided a seat that swiveled at all times, without a locking mechanism, as plaintiff had suggested as the basis for his claim, the seat would likely violate this regulation.

Although the Court of Appeals determined that the standard of care in a FELA negligence claim "is determined under the common-law 'ordinary prudence' standard" (Exhibit 1, p. 4), in a split decision, the Court of Appeals reversed the decision of the Trial Court dismissing plaintiff's negligence claim that the seat design was unsafe, and remanded the case for trial. In doing so, the Court of Appeals stated that it disagreed with the defendant and the Trial Court that expert testimony was needed in order to establish that the seat was unsafe as designed. (Exhibit 1, p. 5.) In its Opinion, the Court of Appeals did not discuss relevant Michigan Supreme Court procedure cited by defendant that requires that evidence must be

admissible to create an issue of fact in order to survive summary disposition. The Court of Appeals considered as an admission, an interoffice memorandum dated September 11, 1990, purportedly from Paul LaClair, that merely reported that several of the Detroit and Chicago engineers had complained about the cab car seats and was based on the record presented, clearly hearsay. The Court stated, in its Opinion, at footnote 4, that there "appears to be no hearsay concern regarding this memo as it would be an admission under MRE 801(d)(2), statement by a party-opponent, or possibly MRE 803(6) business records exception." (Exhibit 1, p. 5.) However, there was no admissible testimony in the record to support the authenticity or to lay a foundation for the introduction of that memo under either MRE 801(d)(2) or MRE 803(6). The "possibility" that plaintiff may have been able to produce such evidence at a later time, such as trial, was not the proper consideration.

In the dissenting opinion, Judge Zahra dissented on the negligent design claim and would have affirmed the Judgment of the Trial Court. The basis for his dissent was plaintiff's lack of expert testimony. "Plaintiff's theory of liability is properly characterized as a claim involving an alleged design defect of the cab seat. Because such a theory presents technical issues beyond the common experience and understanding of the average juror, expert testimony is necessary to establish a defect." (Exhibit 1, Dissenting Opinion, pp. 1-2.)

Defendant also argued at the trial court level and in the Court of Appeals that plaintiff's FELA claim was precluded, or as some courts have stated, "preempted" because defendant was in compliance with the LIA and its regulations. Although the Court of Appeals noted that compliance with the LIA or its predecessor, the BIA, would preempt any state law claims within its scope, it held preemption did not apply when a state law claim was not involved and further

that compliance with the LIA was "not determinative of negligence under the FELA . . .." (Exhibit 1, p. 2.)

II. STATEMENT OF FACTS

The accident occurred on May 18, 1998 at approximately 11:30 a.m. at the Lilly Road crossing located in Canton Township, Michigan. Lilly Road runs north and south and crosses the Conrail tracks at a 90° angle. The crossing had the utmost protection — both flashers and gates. Plaintiff offered no evidence that they were not working.

There were two sets of tracks at the crossing running east and west. The train was traveling westbound at approximately 70 miles per hour on the north set of tracks. The traffic at the crossing mainly consisted of trucks entering a landfill. The engineer's view of the traffic at the crossing from the westbound approach was unobstructed for more than a mile. Plaintiff testified that he first saw a "big green dump truck" close to the tracks when he was approximately three-quarters of a mile away. (Exhibit 3, p. 79.)

> Q. And how fast were you going as you approached Lilly?
> A. Seventy.
> Q. And as you approached Lilly, what, if anything did you observe that caught your attention?
> A. About three quarters of a mile away from Lilly Road I noticed a big green dump truck that was close to the tracks.

Although he admitted he had total discretion to stop the train, it was his policy not to do so until he hit something. (Exhibit 3, p. 145.)

> Q. If it is close, you have where you think there is likely enough to be an accident, I take it you put the train in emergency?
> A. No.
> Q. You don't even if you think you are going to strike them?
> A. If it is close enough that I am going to hit them, there might be an accident?

Q. Yes.
A. No.
Q. You still don't put the train in emergency?
A. Unless a crash was imminent, no.
Q. THAT'S WHAT I MEAN. IF YOU BELIEVE YOU ARE GOING TO STRIKE A VEHICLE, YOU PUT THE TRAIN IN EMERGENCY?
A. THE ENGINEER'S RULE OF THUMB IS YOU DON'T PUT IT IN EMERGENCY UNTIL YOU'VE MADE THE CONTACT.
(Emphasis added.)

As plaintiff traveled closer to the crossing, he became more and more concerned that he would strike the truck. However, he took no evasive action even when he observed the truck closer to the track at one-half mile away and the truck backing up at one-quarter of a mile away. (Exhibit 3, pp. 80, 147.) Finally, at approximately 150 feet, he made the decision to put the train into emergency. (Exhibit 3, p. 147.) When the side mirror of the locomotive struck the rear end of the truck, glass started flying through the small side window of the locomotive that plaintiff had left opened. During that split second between the time the glass started coming through the window, but before it struck plaintiff, plaintiff testified he panicked and tried to get out of his seat but had trouble because the seat did not swivel without releasing a latch. He also testified that the opening to exit the seat was too narrow "with the arm rest and stuff" so when the glass started falling, he "jumped over the edge of the arm rest . . . and hit the floor." (Exhibit 3, pp. 41, 86-87.) Plaintiff attached a photograph of a cab of a locomotive to his response to defendant's Motion For Summary Disposition that was never identified by any witness in the case. There are numerous varieties of locomotives and locomotive cabs.

Plaintiff testified, and in his answers to interrogatories stated, that when he applied the emergency brakes at 150 feet, the train slowed from 70 m.p.h. to approximately 60 m.p.h. by the time it reached the crossing. (Exhibit 6, Plaintiff's Answers to Interrogatories, Nos. 60 and 64.)

If he had applied the emergency brake at three-quarters of a mile, certainly he could have stopped the train. Even at a quarter of a mile, had plaintiff applied the emergency brake, he probably could have stopped the train or at least substantially reduced the speed of the train so that the imminent collision would have been less severe. The rear of the truck knocked off the side view mirror on the north side of the cab car — there was no other damage to the cab car locomotive.

Plaintiff admitted that he would not have been penalized for slowing down or stopping the train. In fact, if he was delayed, he would get overtime. (Exhibit 3, p. 124.) Amtrak Operating Rules require engineers to take the safe course of action. James Hughes, an engineer and plaintiff's supervisor at the time of the accident, testified he always advised his engineers to slow down the train to any speed they were comfortable with, if they felt it was a matter of safety. (Exhibit 7, James Hughes Deposition, p. 39.)

> Q. So the engineer is free to travel less than 70 miles per hour?
> A. Yes, he is. My deal as manager, whenever an engineer felt that safety was an issue, for him to slow down to whatever speed he felt comfortable at.

Plaintiff testified at his deposition that there were no defects on the cab car he was operating. (Exhibit 3, p. 77.)

> Q. Were there any defects you noted with a cab car or a locomotive?
> A. None were noted.

Although there were no defects, plaintiff testified he was concerned about the crashworthiness of the cab car because it is closer to the ground than a full-size locomotive, and there was less metal in front of the cab car than there is in a full size locomotive. (Exhibit 3, pp. 93-94.) He admitted that he had no knowledge about the structure of the cab car as it related to its crashworthiness. (Exhibit 3, p. 94.) Plaintiff offered no other evidence that the locomotive was not crashworthy.

The engine plaintiff was operating was commonly referred to as a "cab car." It does not have power, but does contain all of the controls necessary to operate the train.[2] The power unit was located on the rear of the train. At the time of the accident, Amtrak trains which traveled east and west to Chicago had power units on one end and a control cab on the other end. This permitted the train to be operated from either end, eliminating the necessity of the train being turned around.

The cab car, as with all railroad equipment, is heavily regulated by the FRA. Pursuant to authority granted to it, the FRA adopted extensive regulations prescribing safety standards for locomotives, 49 CFR § 229, *et seq.*. 49 CFR § 229.141 establishes the design requirements for the body structure of MU Locomotives. MU Locomotives are defined by the regulations to include cab cars. 49 CFR § 229.5(k)(1).

Plaintiff testified at his deposition that he was told that the FRA banned the use of cab cars (Exhibit 3, p. 97), but no such mandate from the FRA exists. Emergency Order 20 issued by the FRA in 1996, and attached to plaintiff's Memorandum as Exhibit C, addressed the issues encountered with cab cars involved in train-to-train accidents but did not prohibit their use. In fact, the focus of this Order was the safety of passengers in the lead unit when a train-on-train collision occurred, not the protection afforded the engineer in the cab. Emergency Order 20 did not ban the use of cab cars but set forth requirements to ensure that train crews follow railroad signals so train-on-train collisions would not occur and discussed their structural integrity and safety.

> "Cab cars provide passenger seating, as well as providing a location from which the train is operated. Cab cars are built with the same minimum longitudinal strength as locomotives and with substantial collision posts at each end to prevent

[2] Cab cars are not merely passenger cars with the controls in front. The cab cars, like locomotives, are specifically designed to withstand severe impact.

incursion of other vehicles into the occupied volume. However, cab cars are lighter than powered vehicles, and no combination of structural measures can wholly prevent harm to persons in collisions involving substantial forces. Occupants of cab cars may incur a significantly higher risk of serious injury when compared with occupants of a locomotive-hauled consist, if the cab car collides with a heavier rail vehicle or any highway or rail vehicle transporting hazardous materials. Similar risks may obtain in the case of electric multiple-unit (EMU) service and diesel multiple-unit (DMU) service, because those vehicles have a structure similar to that of a cab car.

FRA recognizes that cab cars have provided hundreds of millions of miles of safe transportation since they were introduced in the late 1950s. EMU and DEU service has been with a high degree of safety since the early decades of this century. However, the recent accidents noted above compel FRA to review the safety of these operations to determine whether means can be found to further reduce the risk of serious injury in the subject service."

(Exhibit 8, Emergency Order 20. p. 5)

Plaintiff testified that there were complaints that the engineer's seat locked in place when in the forward position. However, in order to unlock the seat, all that was necessary was to pull out a latch under the front of the seat, allowing the seat to swivel. Another engineer, Ron Black, testified at his deposition that the time necessary to release the latch was the time it took to reach down between your ankles. (Exhibit 5, p. 22.) Plaintiff claims the seat design was unsafe under these circumstances because of the time it took to release the latch so that it would swivel. He claimed that because of the seat design, there was insufficient time to exit the cab in an emergency and retreat to the safer confines of the coach of the cab where the passengers were located. However, based on the facts of this case, plaintiff had more than sufficient time to unlatch the seat and exit the cab had he done so when a collision appeared imminent just one-quarter mile away when the truck started to back up. Since plaintiff waited until after the impact with the truck to exit the seat, he had no time to exit the cab or the seat before the collision, even if the seat had not been locked in place. Additionally, plaintiff offered no testimony that the coach of the cab provided any more safety from a collision than the cab itself. Emergency Order

20 discussed extensively the danger to passengers in the coach area of a cab car. In fact, that was the primary focus of Emergency Order 20 – the danger of injury to passengers in the coach of a cab car. "Emergency Order Requiring Enhanced Operating Rules and Plans for Ensuring the Safety of Passengers Occupying the Leading Car of a Train." (Exhibit 8, p. 1.)

Jim Hughes, an engineer and former station manager in Detroit at the time of the accident, testified he had no difficulty exiting the seat of a cab car when it was locked into place. He is roughly 4 inches taller and, conservatively, 60 pounds heavier than plaintiff. (Exhibit 7, pp. 76-78.)

The FRA enacted a regulation on locomotive seats. This regulation, 49 CFR § 229.119(a), does not require a seat to swivel but does require them to be secured and braced.

Although plaintiff testified he was concerned about the crashworthiness of cab cars, his testimony is inconsistent with this claim. He was not concerned enough to slow down or take evasive action until he was 150 feet from the crossing, even though he admitted all the passengers in the cab car were kindergarten children.

There was testimony by plaintiff and engineer Black that engineers complained about the fact that the seat on a cab car of the type involved in this accident latched in the forward position and had to be released by simply pulling out a latch under the seat in order to swivel the seat. It should be noted that moving the seat was not unique to cab cars. Engineer Hughes testified that on the larger locomotives, the seat slides underneath the control panel. He stated that in order for him to exit the seat, it was necessary for him to slide it back and walk out. He testified that he could do the same thing in a cab car without swiveling the seat. (Exhibit 7, pp. 36, 76-77.) In other words, an engineer could exit the seat on the cab car by either sliding the seat back or releasing the latch to turn the seat.

Engineer Black was an Amtrak employee whose deposition was taken in discovery. He was not, as claimed by plaintiff at page 7 of his Brief on Appeal, part of a committee formed by Amtrak to review complaints regarding crashworthiness of cab cars or any other complaints relating to cab cars. None of the exhibits attached to plaintiff's Memorandum stated otherwise. Mr. Black explained that he held a position with the Union, not Amtrak, and as part of his Union activities, he received complaints relating to cab cars at one time. His title was Local Committee of Adjustment. There was not a separate committee appointed by Amtrak or the Union.

Q. Where you a member of the union at that time?
A. Yes.
Q. Were you a union rep at that time.
A. No. I was on the local committee of adjustment. That was my title in the union, but I wasn't the local chairman if that is what you mean.
Q. So you were a —tell me what that committee was again?
A. Local committee of adjustment. All it does is like liaison.

(Exhibit 5, p. 10.)

Q. Back to the committee you were a member of and some time designated to compile complaints regarding this M Fleet cab cars, is this a safety committee or was it a special committee for this purpose?
A. No. It was just a union position like, a committee of adjustment and just the position in charge of ?
Q. Michigan?
A. Well yea, in Detroit there is a local division, 19 now.

(Exhibit 5, p. 32.)

In plaintiff's Memorandum to the Trial Court, plaintiff attached the 1990 memo allegedly from Paul LaClair, as Exhibit K and identified it at page 7 of the Memorandum as "Exhibit K (Exhibit to Hughes Deposition)." The 1990 memo was marked as Exhibit 7 in Hughes' deposition but was not identified and was only discussed briefly at pages 25 and 48 of Hughes' deposition. No attempt was made to authenticate the 1990 memorandum at Hughes' deposition, or to establish what the scope of LaClair's agency or employment was in 1990. In fact, Hughes

testified that he didn't know anything about what occurred in the Detroit area prior to 1997, because he wasn't here at the time. (Exhibit 7, pp. 49-50.) Not only wasn't the 1990 memorandum authenticated at Hughes' deposition, no testimony was provided to establish it was an admission or even authored by LaClair.

In his Brief on Appeal, plaintiff identified the 1990 memorandum as "an internal memorandum" obtained as part of Mr. Black's deposition. (Plaintiff's Brief on Appeal, p. 8.) However, the memorandum was never identified at Black's deposition, nor was there any testimony regarding the memorandum at his deposition. Nowhere in plaintiff's Brief on Appeal does he identify any testimony to authenticate the 1990 memorandum or lay a foundation for its admission. The Court of Appeals merely relied on plaintiff's attorney's argument in his brief, without the benefit of any testimony to consider the 1990 memorandum as "possibly admissible."

In summary, there was no expert testimony offered by plaintiff that the seat on the cab car that latched in place when the seat is in the forward position was not reasonably safe. The only evidence offered by plaintiff on this issue was the lay testimony of plaintiff and engineer Black. Furthermore, there was no admissible evidence presented to the Trial Court that there was any directive by Amtrak that seats be replaced, as claimed by plaintiff. The 1990 memorandum of Paul LaClair, referred to at page 8 of plaintiff's Brief on Appeal, was not only hearsay, but it merely stated the concerns of engineers in Detroit that the seat be modified so that it swivels and does not lock in one position. (Exhibit 9, 1990 LaClair Memo.) In the memorandum, Mr. LaClair recites that engineers in Detroit are concerned that the cab car seat locks in place and should be modified so that it doesn't lock in place. Nowhere in the memorandum does Mr. LaClair state that he thought the seat should be modified. Engineer

Hughes gave no testimony at page 37 of his deposition (as stated at page 8 of plaintiff's Brief on Appeal) that there was a program to modify the seats that was incomplete. All he stated at page 37 of his deposition was that he did not remember whether or not all of the seats swiveled. (Exhibit 7, p. 37.) With regard to the testimony pertaining to the seats, the evidence presented by plaintiff only establishes that some engineers made complaints about the type of seat involved in the accident and that there were other types of seats with a different type of locking device (Exhibit 5, p. 46) that could have been used on the cab car in question.

In regard to plaintiff's action at the time of the accident, plaintiff actually began to sound his whistle at the whistle post, as is required by Amtrak's operating rules, approximately one-quarter mile from the crossing. Plaintiff testified that he put the train into emergency at approximately 150 feet due to the fact that he feared there was going to be a collision.

When plaintiff first noticed the truck, he was approximately three-quarters of a mile away, and the truck was stopped approximately 6 feet from the crossing. (Exhibit 3, p. 80.) When he got approximately one-half mile away, because he could see the rails more clearly, it looked like the truck's distance from the track was not as great. (Exhibit 3, p. 81.) Then, as he got closer, he could see that truck was backing up, and as he got closer yet, and as he was really laying on the horn, the truck stopped. (Exhibit 3, p. 81.) After the collision occurred and the glass started flying, he jumped or pulled himself out of the seat and fell on the floor. Plaintiff had total discretion to slow or stop the train. He could have slowed the train at three-quarters of a mile if he was, in fact, concerned about the crashworthiness of the cab car. However, he, admittedly, failed to do so at one-quarter of a mile, when he saw the truck backing up, which clearly startled him:

> "**So when I am getting down there, I see he is backing up. I am really laying on the whistle and I just can't understand. This guy is stopped that son-of-a-bitching truck and I really blasted**."
>
> (Exhibit 3, pp. 81-82.)

He made the observation of the truck backing up at a quarter of a mile. However, even then, he took no evasive action for his own protection or for the numerous kindergarten children that were in the cab car. (Exhibit 3, p. 147.)

ARGUMENT

I. THE COURT OF APPEALS' FAILURE TO AFFIRM THE TRIAL COURT'S DECISION GRANTING SUMMARY DISPOSITION ON PLAINTIFF'S NEGLIGENCE CLAIM UNDER THE FELA THAT DUE TO THE CONERNS OF THE CRASHWORTHINESS OF THE LOCOMOTIVE CAB AND THE CRAMPED DESIGN OF THE LOCOMOTIVE CAB, DEFENDANT SHOULD HAVE PROVIDED A LOCOMOTIVE SEAT THAT WAS DESIGNED TO SWIVEL WITHOUT ANY LATCH TO SECURE IT IN PLACE SO THAT PLAINTIFF COULD EXIT THE SEAT WITHOUT TAKING A SECOND TO UNLATCH IT AFTER A COLLISION HAD ALREADY OCCURRED REQUIRES REVERSAL WHERE THERE WAS NO ADMISSIBLE OPINION TESTIMONY OR OTHER ADMISSIBLE EVIDENCE PRESENTED TO THE TRIAL COURT AS REQUIRED BY THIS COURT'S DECISION IN *SMITH v GLOBE LIFE INS CO,* 460 MICH 446 (1999) THAT THE LOCOMOTIVE WAS NOT CRASHWORTHY, THE DESIGN OF THE LOCOMOTIVE CAB WAS UNSAFE, THE DESIGN OF THE SEAT WAS UNSAFE, NO TESTIMONY THAT ANY EQUIPMENT WAS DEFECTIVE AND NO CLAIM THAT DEFENDANT FAILED TO COMPLY WITH EXTENSIVE FEDERAL REGULATIONS ON THE DESIGN OF THE LOCOMOTIVE AND THE SEAT.

A. In Order To Defeat Defendant's Motion For Summary Disposition, Plaintiff Was Required To Present Admissible Evidence Of Ordinary Negligence To Support His FELA Negligent Design Case

On appeal, this Court conducts a *de novo* review of the resolution of the summary disposition motion. *Corley v Detroit Bd of Ed,* 470 Mich 274, 277 (2004). This Court must consider if there was any admissible evidence sufficient to support plaintiff's negligence claim under the FELA. MCR 2.116(C)(10) and MCR 2.116(G)(4).

The FELA is a pure comparative negligence statute. Any negligence of the plaintiff reduces his claim in proportion to his fault. 45 USC §§ 53 and 54. Thus, even if the employer is 1% at fault and the employee 99% at fault, the plaintiff under the FELA would recover 1% of his damages. Although a plaintiff can recover for the slightest negligence, 1%, a plaintiff under the FELA still must meet the burden of proof for a traditional negligence case. Plaintiff, not the

Trial Court, misunderstood his burden of proof under the FELA. It is not less demanding than an ordinary negligence case as argued by plaintiff extensively before the Trial Court and the Court of Appeals. Before a plaintiff may recover, he must show first that the railroad was negligent and, second, that the railroad's negligence was a cause of plaintiff's damage. As stated by the Court in *Tiller v Atlantic Coast Line RR*, 318 US 54, 67 (1942): "Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury." The Sixth Circuit reiterated the holding of *Tiller* in *Rodriguez v Delary Connecting RR*, 473 F2d 819 (6th Cir 1971):

> The Federal Employers' Liability Act consistently has been construed liberally by the courts to allow employees, injured in the course of their employment, to recover even where the negligence of the employer has been minimal. However, the employee must still demonstrate some negligence and proximate cause. *Herdman* v. *Pennsylvania RR Co.*, 352 U.S. 518, 520, 77 S. Ct. 455, 1L.Ed, 2d 508 (1957): *Tiller v. Atlantic Coast Line RR Co.*, 318 U.S. 54, 67, 63 S.Ct. 444, 87 L.Ed. 610 (1943.) (Emphasis added.)
>
> *Tiller, id.*, at 820.

Further, the FELA **IS NOT A WORKER'S COMPENSATION PLAN** "for contrary to the rule under workmen's compensation acts, the Federal Employers' Liability Act does not impose liability without fault. . ." *Burch v Reading Company*, 240 F2d 574, 580 (3rd Cir 1957). "The FELA is not a workers' compensation system. Employers' negligence remains a prerequisite to liability." *Soto v Southern Pacific Transp Co*, 644 F2d 1147, 1148 (5th Cir 1981).

It is plaintiff's burden to prove negligence of the railroad. *Wilkerson v McCarthy*, 336 US 53 (1949). The happening of an on-the-job injury creates no presumption of negligence. The FELA does not make a railroad the insurer of the safety of its employees or of the places in which they work. *Ellis v Union Pacific RR*, 329 US 649 (1947). In *Reese v Philadelphia & Reading RR*, 239 US 463 (1915), the Supreme Court noted:

> The rule is well settled that a railroad company is not to be held as guaranteeing or warranting absolute safety to its employees under all circumstances, but is bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, tracks, and other structures. (Emphasis added.)
>
> *Reese, id.*, at 463 and 465.

Plaintiff's assertion in his Brief on Appeal that his burden of proof on the issue of negligence in a FELA case is something less than ordinary negligence was not accurate. In *Guatreaux v Scurlock Marine, Inc*, 107 F3d 331 (5th Cir 1997), the Court discussed extensively the standard of care required in a negligence case brought under the FELA.

> We agree with the Third Circuit that nothing in the text or structure of the FELA—Jones Act legislation suggests that the standard of care to be attributed to either an employer or an employed is anything different than ordinary prudence under the circumstances.
>
> *Gautreaux, id*, at p. 338.

The Court of Appeals agreed citing *Gautreaux, id.*, that negligence under the FELA is "ordinary prudence." (Exhibit 1, p. 4.)

Thus, in order for plaintiff to prevail on his FELA claim, he must prove with admissible evidence the traditional common law elements of negligence, including failure to do what a reasonable person would do under the circumstances.

> To prevail on a FELA claim, a plaintiff is required to "prove the traditional common law elements of negligence: Duty, breach, foreseeability, and causation" *Adams*, 899 F.2d at 539 (quoting *Robert* v. *Consolidated Rail Corp.*, 832 F.2d 3, 6 (1st Cir. 1987)).

In plaintiff's Memorandum in Opposition to Defendant's Motion For Summary Disposition, plaintiff relied on an incorrect standard to be applied by the Trial Court in ruling on a motion for summary disposition, inviting the Trial Court to follow case law that had been expressly overruled that had permitted a summary disposition motion to be denied unless it was

"impossible for a claim to be supported at trial." At page 13 of plaintiff's Memorandum, plaintiff cited the applicable law as follows:

> In considering such a motion, the court may consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion. Mich R. Civ. P. 2.116(G) *Radtke* v. *Everett*, 442 Mich. 368, 374, 501 N.W.2d 155 (Mich. 1995) All questions of reasonable doubt are to be resolved in favor of the non-moving party. *Goins* v. *Greenfield Jeep Eagle*, Inc., 449 Mich. 1, 4, 534 N.W.2d 467, 468 (Mich. 1995). In other words, **THE COURT MUST BE SATISFIED THAT IT IS IMPOSSIBLE FOR THE CLAIM OR DEFENSE TO BE SUPPORTED AT TRIAL** because of some deficiency which cannot be overcome. *Radtke*, 442 Mich. at 374, 534 N.W.2d at 159, n.2. (Emphasis added.)

Radtke v Everett, 442 Mich 368, 374 (1993) relied on the case of *Rizzo v Kretschmer*, 389 Mich 363, 374 (1973), *superceded by Maiden v Rozwood*, 461 Mich 109 (1999), for the above quoted language.

> FN2. In other words, **THE "COURT MUST BE SATISFIED ... THAT 'IT IS IMPOSSIBLE FOR THE CLAIM OR DEFENSE TO BE SUPPORTED AT TRIAL BECAUSE OF SOME DEFICIENCY WHICH CANNOT BE OVERCOME.'"** *Stevens* v. *McLouth Steel*, 433 Mich. 365, 370, 446 N.W.2d 95 (1989), quoting *Rizzo* v. *Kretschmer*, 389 Mich. 363, 372, 207 N.W.2d 316 (1973). (Emphasis added)
>
> *Radtke, id,* at p. 374.

The language in *Rizzo* was expressly overruled by this Court in *Smith v Globe Life Insurance Company,* 460 Mich 446, 455 (1999):

> FN2. We take this occasion to note that a number of recent decisions from this Court and the Court of Appeals have, in reviewing motions for summary disposition, brought under MCR 2.116(C)(10), erroneously applied standards derived from *Rizzo* v. *Kretschmer*, 389 Mich. 363, 207 N.W.2d 316 (1973). These decisions have variously stated that a court must determine that summary disposition under MCR 2.116(C)(10) is appropriate only when the court is satisfied that "it is impossible for the nonmoving

party to support his claim at trial because of a deficiency that cannot be overcome." *Paul* v. *Lee*, 455 Mich. 204, 210, 568 N.W.2d 510 (1997); *Horton* v. *Verhelle*, 231 Mich. App. 667, 672 588 N.W.2d 144 (1998).

These *Rizzo*-based standards are reflective of the summary judgment standard under the former General Court Rules of 1963, not MCR 2.116(C)(10). *See McCart, supra,* at 115, n. 4, 469 N.W.2d 284. Under MCR 2.116, it is no longer sufficient for plaintiff to *promise to offer* factual support for their claims at trial. As stated, a party faced with a motion for summary disposition brought under MCR 2.116(C)(10) is, in responding to the motion, required to present evidentiary proofs creating a genuine issue of material fact for trial. Otherwise, summary disposition is properly granted. MCR 2.116(G)(4). (Emphasis added)

The plaintiff, relying on the wrong standard, tried to defeat defendant's motion by arguing allegations in pleadings and inadmissible evidence. In this case plaintiff, not defendant, had the burden of proving duty, negligence, breach of duty and causation.

Therefore, since plaintiff had the burden of proof at trial on these issues, he cannot rely on his allegations in his pleadings, but must set forth admissible evidence that a genuine issue of fact exists. MCR 2.116 (G)(6).

(6) Affidavits, depositions, admissions and documentary evidence offered in support of or in opposition to a motion based on subrule (c)(1)—(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion. (Emphasis added)

B. Plaintiff Failed To Produce Any Admissible Evidence That Was Sufficient To Support His Negligent Design Claim

Under the FELA, defendant is not required to provide the latest, best, or the most perfect equipment with which to work, nor is it required to stop using equipment that is already in use upon discovery of later improvements, so long as the use is reasonably safe. *Atlantic Coast Line*

Railroad, Co v Dickson, 189 F2d 525 (5th Cir 1951), *cert denied*, 342 US 830 (1951). Therefore, the issue under the FELA is whether or not the design of the cab car seat was reasonably safe — not if a different seat that didn't lock in place in the forward position could have been provided. Plaintiff did not claim, nor is there any evidence to support such a claim, that the cab car or the seat did not meet the design requirements of the FRA regulations.

Although plaintiff offered testimony the described the locomotive cab as cramped, his testimony is clear that the only reason he dove out of the seat after the initial collision was because the glass started coming through the window and he did not have time to unlatch the seat and swivel it to avoid the glass. The only testimony plaintiff offered to support his claim that the seat design created an unreasonable risk of harm was the lay opinion testimony of engineer Black and plaintiff and their testimony that other engineers had complained about the seats. Plaintiff cannot offer these opinions as lay opinion testimony pursuant to MRE 701. This rule permits the opinion of lay witnesses, but only to the extent that the opinion is rationally based on the perception of the witness.

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.
>
> MRE 701.

Opinion testimony regarding the "standard of care" is not based on physical perception, therefore, it is inadmissible under MRE 701. *Troyanowski v Village of Kent City*, 175 Mich App 217, 225-226 (1988).

The Court of Appeals did not even consider this as lay opinion testimony but stated: ". . . plaintiff asserts that defendant was negligent in failing to remove seats equipped with a

locking mechanism installed in the cramped confines of certain cab cars which plaintiff contends created an unreasonable risk of harm given the engineers need to exit the seat quickly in the case of an emergency. To establish this point, plaintiff presented the testimony of himself and fellow engineer, Ronald Black, both of whom stated that the seat was unsafe as employed." (Exhibit 1, p. 5.) The Court also noted that Black testified that he had become aware of complaints by other engineers and that plaintiff also offered as evidence an interoffice memorandum of 1990 by plaintiff's supervisor to support this claim. The Court of Appeals concluded that "while the seat design itself may have been safe, plaintiff's chief complaint with the seat design was that it was unsafe as employed by defendant given the foreseeability of the need to exit quickly in case of an emergency." (Exhibit 1, p. 5.) This conclusion can only be reached if there, indeed, was a need to exit the cab car quickly to the coach compartment of the cab car. Plaintiff's testimony was that he was concerned about the crashworthiness of the cab car. "Everyone feels they are not crashworthy (Exhibit 3, p. 94), and Black felt they were so unsafe." (Exhibit 5, p. 17.)

However, plaintiff admitted that he had no actual knowledge of how strong the cab car was or what kind of an impact it could withstand. (Exhibit 3, p. 94.) As stated previously, cab cars must meet the same structural requirements as any locomotive. There was no expert testimony offered by plaintiff on the crashworthiness of the cab car. Plaintiff abandoned his claim that cab cars weren't crashworthy in his appeal to the Court of Appeals.

Engineer Black admitted he was not aware of any accident where the structure of the cab car itself was damaged that would threaten injury to anyone. (Exhibit 5, pp. 41-42.) The Keith Hubbard case was the only case that he was aware of where an engineer was injured because the seat locked in place. There was no testimony that the coach of the cab car was safer than the cab if an accident should occur. In summary, there was absolutely no evidentiary facts to support the

premise that there was any "necessity to exit the cab of the locomotive if a collision occurred." In fact, in this case, plaintiff attempted to get out of his seat, not because of his fear of a collision with the truck, but because at impact glass started coming through the side window of the locomotive, which the plaintiff had left open.

There was also no testimony that there was any need for plaintiff to exit the cab faster than the locking mechanism permitted. In order to unlatch the seat, all that was necessary was to reach down between your ankles and pull the latch in front of the seat. (Exhibit 5, pp. 21-22.) Plaintiff had ample time to exit the seat, had he done so when the train was one-quarter of a mile away, and the collision was imminent. (Exhibit 3, p. 145.) However, plaintiff stated that he never took evasive action until he hit something. There was simply no basis for a jury to conclude, based on the facts, that it was reasonably foreseeable that an engineer would wait until after a collision occurred to exit the seat of the cab car, because of his belief that the cab car was not crashworthy, before retreating to the coach of the cab car without any expert testimony that the cab car was not crashworthy or that the coach was a safer area. This is particularly true given that there was no claim that the cab car did not comply with specific regulations on the structure of the cab car and cab car seat. As stated by the dissenting judge in the Court of Appeals' decision:

> Plaintiff's theory of liability is properly characterized as a claim involving an alleged design defect of the cab seat. Because such a theory presents technical issues that are beyond the common experience and understanding of the average juror, expert testimony is necessary to establish a defect.
>
> (Exhibit 1, pp. 1-2.)

Two of the cases cited by Judge Zahra in his dissent held that testimony by trainmen that a cab of an engine was not properly designed and unsafe is not admissible as either lay or expert

testimony under the identical federal rules. In *Rice v Cincinnati, New Orleans and Pacific Ry Co,* 920 F Supp 732, 736 (1996), plaintiff sued under the FELA claiming that the railroad failed to provide him a reasonably safe place to work, because the seat was so large that he was unable to swivel it without striking the wall or the engineer's console – a claim very similar to plaintiff's in this case. Just as in this case, in *Rice,* plaintiff claimed that he was unable to easily enter and exit the chair. Obviously recognizing that such testimony would not be allowable under the rules of evidence as a lay opinion, because it could not possibly be based on the witnesses' perception alone, the plaintiff in *Rice* attempted to offer the opinion testimony of several engineers regarding the seat as expert testimony. The Court of Appeals affirmed the Trial Court's exclusion of such testimony and stated as follows:

> . . . scrutinizing the proffered testimony of plaintiff's fellow trainmen as described in the motion in limine, it is readily apparent that they do not have the qualifications to offer expert opinions that the cab car design is unsafe. Many factors would have to be considered beyond the size of the seat to offer such an opinion. What other ergonomic functions must the seat fulfill? If it was smaller, would this increase the engineer's fatigue or otherwise effect his or her performance? Such questions are beyond the expertise of the proffered trainmen and address themselves to an expert in ergonomics or engine design.
>
> *Rice, id.,* at 737. (Emphasis added)

Citing *Rice*, the Court in *Thirkill v J B Hunt Transport, Inc*, 950 F Supp. 1105 (ND Ala, 1996), another case very similar to plaintiff's claim in this case, held that the plaintiff, in that case, a locomotive engineer and other trainmen were not qualified to testify as to the design of a locomotive cab and the location of a brake valve. Plaintiff in that case testified he was thrown against an independent brake valve in the cab of a locomotive in a crossing accident with a truck.

> Additionally, Mr. Thirkill has claimed that the locomotive was an unsafe place in which to work because of the location of the independent brake valve. He has testified by deposition that he

thinks he must have been thrown against the brake valve. Even were plaintiff's assumption true, the record is void of expert testimony or other evidence to the effect that there was a defect in the design of the locomotive cab and/or the location of the brake valve. Neither the plaintiff nor fellow crewmen are qualified to testify as design experts. (Emphasis added.)

Thirkill, id., at 1107.

Since neither engineer Black nor plaintiff is an expert in ergonomics or engine designs for crashworthiness, they should not be permitted to offer testimony that the design of the seating in a cab car was unsafe because of the need to exit the cab because it was not crashworthy. Absent such testimony, there is no evidence to support plaintiff's claim. Engineer Hughes testified that he had no difficulty sliding the seat back on the cab car and exiting it just as he did on a full sized locomotive. (Exhibit 7, pp. 76-77)

In this case, the testimony established that plaintiff saw the truck close to the crossing three-quarters of a mile away. Although the truck backed up at one-quarter mile, plaintiff still took no action.

A. . . . So when I'm getting down there, I see he is backing up. I'm really laying on the whistle and I just can't understand. This guy stopped the son of a bitching truck and I really blasted.
Q. At that time, had you put on the brakes at all?
A. No, not that.

* * *

Q. Roughly where were you when you first started to think he was backing up, about how far away?
A. I questioned the fact about maybe around a quarter of a mile or so. And then it was obvious that he was because – not that I could certainly see him moving, but I knew that – you know, the tracks sure weren't moving. I know he was getting closer. So I put it in emergency probably 150 feet away or thereabouts, and my main concern then was getting out of this cubby hole.

(Exhibit 3, pp. 81-82.)

Plaintiff finally put the train in emergency when he was 150 feet, or 1½ seconds from impact, at 70 m.p.h., because it was his practice not to put the train in emergency until he hit something. (Exhibit 3, p. 145.) He chose this course of action in spite of Amtrak's Operating Rules and his supervisor's, James Hughes, policy that when safety is an issue, engineers should slow down to whatever speed is safe. (Exhibit 7, p. 39.) Plaintiff admitted that he would not have been penalized for slowing down or stopping the train. In fact, he admitted he would get overtime. (Exhibit 3, p. 124.)

The testimony is unrefuted that it took no more time to release the latch to swivel the seat than it took to reach down between your legs. (Exhibit 5, pp. 21-22.)

Plaintiff's former supervisor Hughes testified that you could also slide the seat back on the cab car and get out the same way he had to exit the seat on larger locomotives. (Exhibit 7, p. 77.) Therefore, unlike the larger locomotives where the engineer had to slide the seat back to exit, on the cab car involved in the accident, an engineer could either slide the seat back or swivel it.

Plaintiff's FELA claim regarding the size of the cab on the cab car and the fact that the seat didn't swivel is obviously a negligent design claim. As the Court stated in both *Rice, supra,* and *Thirkill, supra,* trainmen are **"NOT QUALIFIED TO TESTIFY AS TO THE DESIGN OF A LOCOMOTIVE CAB."** The only evidence of negligence offered by plaintiff is his testimony, the testimony of engineer Black, vague complaints of other engineers that the seat shouldn't lock in place. If the testimony of plaintiff and Black regarding the seat design was not admissible or sufficient for a jury to find negligence, then complaints regarding the seat design are also insufficient to establish negligence.

The only additional evidence the Court of Appeals relied on was a copy of a typed document that was entitled "Interoffice Memo" that states on its face that it is from Paul LaClair to Marshall Berryhill. (Exhibit 9.) The document is not signed by LaClair and could have been typed by anyone. Plaintiff cited no testimony from any deposition in his Memorandum to the Trial Court or in his Brief on Appeal to authenticate the LaClair memorandum or to lay a foundation for its admission. The reason is quite simple, there was no such testimony. Defendant argued to the Trial Court and the Court of Appeals that this document was hearsay. (*See* page 12 of Defendant's Brief to the Court of Appeals.) It fits squarely within the definition of hearsay contained in the Michigan Rules of Evidence.

The Court of Appeals stated in its opinion that "defendant's own employees directed that these seats be replaced because of the specific safety concern plaintiff alleges was the cause of his injuries. (Exhibit 1, p. 5.) This was apparently in reference to the 1990 memorandum. However, the memorandum does not direct that the seat be replaced, it only purports to state the concern of several engineers in Detroit and Chicago. It was defendant's contention before the Trial Court and before the Court of Appeals that the 1990 memorandum was hearsay.

> **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
>
> MRE 801(c).

The Court of Appeals stated that the memorandum was not hearsay:

> There appears to be no hearsay concern regarding this memo as it would be admissible under MRE 801(d)(2), statement by a party-opponent, or possibly MRE 803(6), business records exception.
>
> (Exhibit 1, p. 5.)

In reaching that conclusion, the Court of Appeals disregarded this Court's ruling in *Smith v Globe Life Insurance Company, supra*, and the Michigan Court Rules relating to summary disposition motions.

> Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)—(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.
>
> MCR 2.116(G)(6).

In order for the 1990 memorandum to have been considered admissible evidence, plaintiff had to come forward with admissible evidence to meet the admissibility requirements for MRE 801(d)(2) or MRE 803(6). These evidentiary rules, in pertinent part, provide as follows:

> (2) *Admission by Party-Opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . .
>
> MRE 801(d)(2).
>
> **(6) Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, . . .
>
> MRE 803(6).

There was no admissible testimony or an affidavit by a qualified witness offered by plaintiff to establish the authenticity of the 1990 memo or to lay a foundation for its admissibility as either a business record or an admission. In fact, there was no testimony at all in that regard. The memorandum was clearly hearsay.

In this accident, plaintiff carelessly gave himself less than 1½ seconds to take any action. Yet, plaintiff claims that a reasonably prudent railroad should have designed the engine compartment so he could have exited the cab in that short period of time without the benefit of any expert testimony to support his claim. Furthermore, there was no reason to believe plaintiff would have been injured if he had remained seated and if he had not left the window on the cab open. All he had to do was close the window. (Exhibit 3, p. 87.) There was no reason for the window to be open. Although plaintiff testified it was a bright, sunny day (Exhibit 3, p. 91), if he was too warm, he could have turned on the air conditioning. Engineer Hughes testified the cab cars have air conditioning. (Exhibit 7, p. 28.)

It was the driver of the truck and plaintiff who were both grossly negligent in the case — there was no admissible evidence of any negligence of defendant.

At the Trial Court, plaintiff failed to recognize that he had to come forth with admissible evidence to defeat defendant's Motion for Summary Disposition. On this issue, just as on the issue of the crashworthiness of the cab car, he didn't come forth with admissible evidence. The Trial Court properly granted defendant's Motion For Summary Disposition on all issues and the Court of Appeals erred in reversing the Trial Court on plaintiff's negligent design claim under the FELA.

II. THE COURT OF APPEALS' FAILURE TO AFFIRM THE TRIAL COURT'S SUMMARY JUDGMENT ON PLAINTIFF'S FELA NEGLIGENT DESIGN CLAIM WITH RESPECT TO THE LOCOMOTIVE SEAT REQUIRES REVERSAL WHERE PLAINTIFF DID NOT CLAIM OR PRESENT ANY EVIDENCE THAT DEFENDANT VIOLATED THE LIA OR FEDERAL REGULATIONS THAT WERE RELEVANT TO PLAINTIFF'S CLAIM AND WHERE PLAINTIFF'S NEGLIGENT DESIGN CLAIM WOULD REQUIRE THAT DEFENDANT PROVIDE A LOCOMOTIVE SEAT THAT SWIVELED AT ALL TIMES EVEN THOUGH THE FEDERAL REGULATION FOR LOCOMOTIVE SEATS, 49 USC § 229.119(a), REQUIRES THAT SEATS BE SECURED AND BRACED, BECAUSE THE FELA CLAIM BASED ON THE FACTS WAS PRECLUDED OR PREEMPTED BY THE LIA.

This Court must conduct a *de novo* review of this summary disposition issue *Corley v Bd of Education, supra.* In this case, plaintiff presented no evidence, admissible or otherwise, that defendant violated the LIA or relevant federal regulations. Plaintiff also presented no evidence that the equipment was negligently maintained or that it was defective. In reference to the evidence presented by plaintiff to show a violation of the LIA, the Court of Appeals agreed that plaintiff presented no evidence to support that claim. ". . . plaintiff presented no evidence that the seat was defective or unsafe in and of itself and even admitted that the seat was working properly on the day of the accident, . . ." (Exhibit 1, p. 7.) The facts also establish that the accident occurred during normal train operations and arose out of a railroad crossing accident that is a common occurrence during railroad operations throughout the United States. Based on all of these facts, the Court of Appeals should have held that plaintiff's FELA negligent design claim was precluded by the LIA.

If defendant had provided a locomotive seat on the cab car that swiveled at all times without a locking device, as plaintiff claims it should have, such a seat design would create a potentially dangerous condition and would most likely be in violation of the FRA regulations enacted pursuant to the LIA that defendant is required to follow. For example, if the seat could not be locked in place, it could swivel unexpectedly as the train went around a sharp curve, hit

rough track, or if the locomotive were struck in the side by a large truck in a crossing accident and throw the engineer to the floor. Furthermore, a locomotive seat without any locking mechanism would likely violate the FRA regulation making it mandatory that seats to be "securely mounted and braced." 49 CFR § 229.119(a). There is no question but that had plaintiff been injured because he fell out of the seat in a collision because the seat suddenly swiveled, throwing him to the floor of the locomotive, he would make a claim that defendant had violated the LIA.

The United States Supreme Court, long ago, held that the Boiler Inspection Act (BIA), the predecessor to the LIA, preempts State law claims regarding locomotive equipment because it was intended to occupy the entire field of locomotive design. In *Napier v Atlantic Coast Line R Co*, 272 US 605 (1926), the Court held that the BIA preempted a Georgia state law requiring "an automatic door to the fire box" and "a cab curtain" on all locomotives used in Georgia. *Id.* at 607. In reaching its holding, the Supreme Court stated that the BIA was intended to occupy the entire field of locomotive design.

> **WE HOLD THAT STATE LEGISLATION IS PRECLUDED, BECAUSE THE BOILER INSPECTION ACT, AS WE CONSTRUE IT, WAS INTENDED TO OCCUPY THE FIELD.** (Emphasis added.)
>
> *Napier, id.* at 613.

Courts interpreting the BIA and LIA have held that the Act specifies what parts are essential to the safe operation of a locomotive. Equipment not required by the LIA or regulations is not considered essential. Following *Napier*, the United States Supreme Court defined what it considered an essential part of a completed locomotive under the BIA:

> With reason, it cannot be said that Congress intended that every gadget placed upon a locomotive by a carrier, for experimental purposes, should become part thereof within the rule of absolute

> liability. So to hold would hinder commendable efforts to better conditions and tend to defeat the evident purpose--avoidance of unnecessary peril to life or limb. Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute. But mere experimental devices which do not increase the peril, but may prove helpful in an emergency, are not. These have not been excluded from the usual rules relative to liability.
> (Emphasis added.)
>
> *Southern Rail Co v Lungsford,* 297 US 398, 402 (1936).

The LIA regulates the entire field of locomotive equipment. In this case, plaintiff has presented no evidence that defendant violated any federal regulations covering the equipment on the locomotive including those relating to crashworthiness and the design of the seat. Because defendant had complied with these regulations, the Court of Appeals affirmed the Trial Court's dismissal of plaintiff's LIA claim.

Based on the authority of *Napier, id.* and *Lungsford, id.*, plaintiff's FELA claim should be dismissed. If plaintiff, in this case, had brought a State law negligence claim that defendant should have provided a seat that swiveled at all time, his claim would have been preempted. However, the Court of Appeals, in this case, held that defendant's compliance with the LIA and its regulations did not preempt or preclude a claim brought under the FELA. The Court of Appeals noted that unlike a State law claim, an FELA claim involves the interaction of two federal statutes and, therefore, the preemption doctrine is not applicable. Relying on the case of *Weaver v Missouri Pacific R Co,* 152 F3d 427 (CA 5, 1998), the Court of Appeals stated that compliance with LIA regulations could not determine if there was negligence in an FELA action.

Numerous cases have held that compliance with the LIA and its regulations does preempt an FELA claim that locomotive equipment should have been provided that was not required by

the regulations. See *In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Alabama, on September 22, 1993*, 188 F Supp 2d, 1341 (SD Ala, 1999). Other courts reaching the same result as "*Sunset Limited*", *id.*, have used the term "preclusion" rather than "preemption" in denying FELA claims that equipment should be provided that is not required by the LIA. In *Norfolk Southern Ry Co v Denson*, 744 So2d 549 (Ala 2000), the Alabama Supreme Court held that an FELA claim, arising out of a grade crossing accident, that the locomotive cab should have had air conditioning to prevent entry of fire was "precluded" by the LIA. Michigan Appellate Courts have not previously addressed this issue.

The majority of courts that have considered the issue have dismissed negligent claims for failure to install equipment not required by the FRA regulations brought pursuant to the FELA. The District Court *In Re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Alabama, on September 22, 1993*, 188 F Supp 2d, 1341 (SD Ala, 1999) relied on several other federal decisions that held that FELA negligence claims cannot stand when they impose duties not required by FRA regulations.

> Like common law negligence claims, FELA negligence claims may not be used to impose duties beyond those imposed by Congress or the FRA — that is, FELA claims may, indeed, be subject to pre-emption. [FN11] See *e.g., Thirkill v. J.B. Hunt Transp., Inc.*, 950 F.Supp. 1105, 1107-08 (N.D. Ala. 1996) (where train speed and locomotive design complied with federal regulations, railroad employees' FELA claims were pre-empted; *Rice v. Cincinnati, New Orleans & Pac. Ry.*, 955 F.Supp. 739, 740-41 (E.D. Ky. 1997); (*Key v. Norfolk So. Ry.*, 228 Ga. App. 305, 491 S.E.2d 511, 513 (1997) (FELA claims of negligence as to locomotive design were pre-empted where locomotive complied with federal statute and regulations.) (Emphasis added.)
>
> *Sunset Limited, id.* at 1349.

In *Thirkill v Hunt Transport, Inc*, 950 F Supp 1105 (ND Ala, 1996), the District Court held that a FELA suit brought by a locomotive engineer claiming that the railroad was negligent

because of the placement of an independent brake valve in the locomotive cab, was preempted by the BIA. See also, *Sidoni v Consolidated Rail Corp*, 4 F Supp 2d 358 (MD Pa. 1996)(FELA claim arising out of a crossing accident that locomotive was not crashworthy, should have had seatbelts and airbags was preempted by the LIA).

In *Weaver*, *supra*, the case relied on by the Court of Appeals in this case, the Weaver Court did not hold that compliance with LIA regulations was not determinative of negligence under the FELA in all cases. The *Weaver* court held that the LIA and its regulations did not totally occupy the field of safety regarding locomotive equipment. The plaintiff in *Weaver* claimed that the railroad should have provided a locomotive with air conditioning and protective window screens to protect from known dangers. *Weaver* presented evidence that there had been 698 reported shootings or stonings of railroad locomotives in a particular area within a four year period.

> The LIA regulations relied upon by the Railroad are not premised on providing safety from such dangers; rather, their focus is on ensuring proper ventilation, a minimum temperature, and an undistorted view. *See* 49 C.F.R. § 229.119(b)(d) (1998). Restated, compliance with these regulations, in the light of the evidence presented at trial regarding the known dangers presented to locomotive engineers traveling through the southern States in the summer, does *not* address the safety of those engineers from known dangers, such as stonings. In sum, in this regard, the LIA and accompanying regulations do *not* totally occupy the field regarding locomotive safety.
>
> *Weaver, id.* at 430.

In *Miciotto v Brown*, 203 WL 22326559 (ED La Oct. 6, 2003), the District Court distinguished *Weaver* based on its facts and held that the LIA precluded an FELA claim that the locomotive should have had seatbelts and safety padding on the locomotive. The Court in

Miciotto distinguished *Weaver* because in *Weaver*, plaintiff had presented evidence of a known danger – that there had been 698 shootings or stonings over a four year period.

In *Denson, supra*, the Supreme Court of Alabama discussed extensively the role of the FRA in regulating equipment on locomotives. Relying on *Napier, supra*, the Court held that the LIA precluded an FELA claim that the locomotive should have been equipped with air conditioning. Like *Miciotto*, the Supreme Court distinguished *Weaver* based on the fact that *Weaver* involved claims that locomotives should have been equipped with air conditioning or protective screens to protect engineers from projectiles. Unlike *Weaver*, in *Denson*, the Supreme Court noted that plaintiff's claim in that case amounted to a claim "simply" that the FELA required locomotives to be equipped with air conditioners.

> To be sure, the plaintiffs have cited Weaver v. Missouri Pacific R.R., 152 F.3d 427 (5th Cir. 1998), and Palmer v. Union Pacific R.R., 12 F. Supp.2d 588 (S.D. Tex. 1998). However, those cases involved claims that the FELA required railroads to equip their locomotives with air conditioning or protective screens in order to protect the operators from projectiles, such as, rocks, bottles, or bullets. We know of no case holding – as the plaintiffs urge us to do – that the FELA simply requires railroads to air condition their locomotives.
>
> *Denson, id.* at 556.

The Supreme Court further noted in *Denson* that the construction of the FELA urged by plaintiff in that case would destroy the uniformity sought in the LIA and federal regulations.

> Thus, were this Court to hold that the FELA carries such a requirement, the uniformity that is jealously guarded by the FRA, and on which various federal policies are grounded, would be destroyed. Under such a construction of the FELA, locomotives operating in Alabama would have to be air conditioned, while those operating in neighboring states would not. The territorial conflict created by judicial caprice would constitute the "piecemeal

regulation of individual hazards" of the sort eschewed by the FRA. 43 Fed. Reg. at 10586.

Denson, id. at 556.

In this case, plaintiff's claim is that locomotives should have seats that swivel without a locking mechanism to secure them in place. Plaintiff has presented no evidence that any engineer had previously been injured when trying to exit a locomotive seat because it would not swivel. He has presented no evidence there is ever a need to exit a locomotive seat in less than a second to avoid injury. It is pure speculation to claim that plaintiff would not have been injured had the seat swiveled freely in this case. Plaintiff likely still would have dove to the floor, even if the seat swiveled – he had no time to do anything else. Plaintiff claimed there was a need to get out of the cab of the locomotive to the coach area of the cab car because the cab was not crashworthy. There was no evidence presented by the plaintiff that the cab was not crashworthy – in fact, he abandoned this claim at the hearing on defendant's Motion For Summary Disposition – or that the coach area was safer. Based on the facts presented by plaintiff, there was no special hazard involved in this case beyond the normal operation of a locomotive. Trains traveling throughout the United States constantly cross roadways and are frequently involved in crossing accidents. Such hazards are clearly within the scope of the LIA and the FRA regulations.

Even more compelling in this case is that plaintiff's FELA claim, that the seat should swivel without a locking mechanism to secure it in place, would compel defendant to provide a locomotive seat that violates the FRA regulation for locomotive seats. 49 CFR § 229.119(a). The regulation requires that seats be securely mounted and braced.

Due to the fact the LIA and extensive regulations for locomotive equipment were intended to set the standard for equipment to be provided for locomotives during normal

operations, plaintiff's FELA claim – that equipment should have been provided that was not required by the LIA or regulations – should have been dismissed. This is particularly true in this case where plaintiff offered no expert testimony that a locomotive seat that swiveled without a locking mechanism would be in compliance with the federal regulation that required locomotive seats to be securely fastened and braced.

The Court of Appeals erred in holding that plaintiff's FELA claim was not precluded by the LIA and federal regulations.

RELIEF REQUESTED

For the reasons set forth above, Defendant-Appellant respectfully requests that this Court:

1. Grant this Application for Leave to Appeal;

2. Upon leave granted, reverse the decision of the Court of Appeals on the following issues:

a) The Court of Appeals ruling that Defendant-Appellant's compliance with the Locomotive Inspection Act (LIA) did not preclude plaintiff's Federal Employer's Liability Act (FELA) claim;

b) The Court of Appeals' ruling denying Defendant-Appellant's Motion For Summary Disposition and reversing the Trial Court's decision granting summary disposition on plaintiff's FELA negligence design claim.

3. Remand the matter to the Court of Appeals for the propose of entering an order affirming the judgment of the Trial Court granting Defendant-Appellant's Motion for Summary Disposition on all issues.

Respectfully submitted,

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